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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDY ODEAN DANIELS,

Defendant and Appellant.

2d Crim. No. B203335  
(Super. Ct. No. F382248)  
(San Luis Obispo County)

Randy Odean Daniels was committed to Atascadero State Hospital as a Sexually Violent Predator (SVP). Dissatisfied with his situation, he conceived a plan to have himself returned to prison by blatantly committing a new offense. His apparent notion was that he would do his time for the new offense and be released. He was wrong. He evidently neglected to factor in his criminal history, which included four qualifying prior serious or violent felonies within the meaning of the Three Strikes law.

Daniels appeals the judgment entered after he pled no contest to possessing paraphernalia (marijuana cigarettes) in a custodial institution (Pen. Code,<sup>1</sup> § 4573.6) and admitted suffering two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). In exchange for his plea, two other prior strike allegations were dismissed. The trial court sentenced him to a total state prison term of 25 years to life. He contends that

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<sup>1</sup> All further undesignated statutory references are to the Penal Code.

his sentence violates the constitutional proscriptions against cruel and unusual punishment and double jeopardy. He further contends that the court abused its discretion in refusing to strike his prior strikes pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. We affirm.

## FACTS

Because appellant pled no contest, the relevant facts are derived from the preliminary hearing transcript. On June 16, 2005, appellant was under commitment at Atascadero State Hospital when a tower officer saw him put something in a knee brace he was carrying under his arm. The knee brace was searched and found to contain three marijuana cigarettes.

## DISCUSSION

### *Cruel and Unusual Punishment*

Appellant contends that his sentence of 25 years to life is cruel and unusual punishment under the federal and California Constitutions. (U.S. Const., 8th Amend.; Cal. Const., art. I, § 17.) We disagree. Appellant is being punished not only for his commission of the current offense, but also for his recidivism. (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 366; *People v. Romero* (2002) 99 Cal.App.4th 1418, 1432.) Moreover, the circumstances underlying the current offense, viewed in light of appellant's recidivism, demonstrate that he is precisely the type of defendant to whom the Three Strikes law is constitutionally applied.

The Eighth Amendment to the United States Constitution "prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime." (*Rummel v. Estelle* (1980) 445 U.S. 263, 271.) But the "gross disproportionality principle reserves a constitutional violation for only the extraordinary case." (*Lockyer v. Andrade* (2003) 538 U.S. 63, 77 [two consecutive 25-years-to-life terms for two petty thefts not grossly disproportionate].) Under the California Constitution, punishment is disproportionate if it "shocks the conscience" considering the offender's history and the seriousness of his offenses. (*In re Lynch* (1972) 8 Cal.3d 410, 424.)

It cannot be said that appellant's sentence of 25 years to life is constitutionally disproportionate to the severity of his crime in light of his recidivism. He has a lengthy criminal record, dating back to March of 1980 when he was the subject of a juvenile dependency petition alleging that he had sexually victimized a four-year-old girl. Nine months later, the juvenile court sustained a petition alleging assault with intent to commit rape, assault with a deadly weapon, and first degree burglary. In 1983, he was convicted for forcible rape and sentenced to seven years state prison. In 1990, he was convicted of rape, kidnapping and robbery and was sentenced to 16 years state prison. At the time he committed the instant offense, he was under an indefinite commitment as an SVP. (Welf. & Inst. Code, § 6600 et seq.)

When faced with recidivist defendants such as appellant, "California appellate courts have consistently found the Three Strikes law is not cruel and unusual punishment." (*People v. Mantanez, supra*, 98 Cal.App.4th at p. 359; see also *Ewing v. California* (2003) 538 U.S. 11, 29-30 [rejecting similar claims of cruel and unusual punishment; 25 years to life for theft of golf clubs].) Appellant's sentence conforms to sentences for repeat offenders under the Three Strikes law and is proportionate to sentences for repeat offenders in other states. (See, e.g., *People v. Romero, supra*, 99 Cal.App.4th at pp. 1432-1433 [25 years to life for theft of magazine]; *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1509-1516 [25 years to life for possession of methamphetamine].)

Even if the Eighth Amendment to the United States Constitution contains a proportionality guarantee outside the context of capital punishment, this is not one of those exceedingly rare cases in which the sentence is grossly disproportionate to the severity of the crime. (*Ewing v. California, supra*, 538 U.S. at p. 21; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994-995.) Nor is the punishment so severe that it shocks the conscience or offends fundamental notions of human dignity. (*In re Lynch, supra*, 8 Cal.3d at p. 424.) This is particularly true considering the circumstances underlying the current offense. While possessing three marijuana cigarettes is not by itself particularly

egregious, appellant's motives for committing the crime render it so. In sentencing appellant, the court noted it was by his design that he was caught committing the offense. Appellant apparently believed he would be sent back to state prison and eventually rendered eligible for parole, thereby circumventing his SVP commitment. His calculated attempt to avoid rehabilitation and blatant disregard for the law demonstrates that he presents a continuing threat to public safety. Given the nature of the offense and appellant's recidivism, his sentence of 25 years to life does not run afoul of the Eighth Amendment.

### *Double Jeopardy*

Appellant contends that his sentence under the Three Strikes law violates the Double Jeopardy Clause of the United States Constitution. While he acknowledges the United States Supreme Court has concluded that recidivist statutes such as the Three Strikes law do not violate the constitutional prohibition against double jeopardy (see, e.g., *Monge v. California* (1998) 524 U.S. 721, 728; *Witte v. United States* (1995) 515 U.S. 389, 403-404), he contends that the court "has only done so when the defendant's priors bore some relation to the triggering offense." He fails, however, to demonstrate that the court's decisions are so limited.

Appellant bases his claim on the following dicta in *Witte*: "To the extent that the [Federal Sentencing] Guidelines aggravate punishment for related conduct outside the elements of the crime on the theory that such conduct bears on the 'character of the offense,' the offender is still punished only for the fact that the *present* offense was carried out in a manner that warrants increased punishment, not for a *different* offense . . . ." (*Witte v. United States, supra*, 515 U.S. at pp. 402-403.) Considered in context, this language does not support appellant's assertion that double jeopardy prohibits the consideration of prior criminal conduct that is unrelated to the instant offense. The court's reference to "related conduct outside the elements of the crime" described conduct arising out of the same course of conduct of the criminal offense, and not the defendant's criminal history. (*Ibid.*)

Appellant does cite one lower federal court case that supports his claim. In *Duran v. Castro* (E.D.Cal. 2002) 227 F.Supp.2d 1121, the court relied on *Brown v. Mayle* (9th Cir. 2002) 283 F.3d 1019, for the proposition that "A stiffened penalty is warranted 'only if the defendant's current offense involves a repetition of a particular offense characteristic, indicating that the defendant remains prone to that specific kind of antisocial activity.'" (*Duran*, at p. 1130.) *Brown*, however, was subsequently vacated by the Supreme Court. (*Mayle v. Brown* (2003) 538 U.S. 901.) Since *Brown* is not valid authority, neither is *Duran* on this point.

As the court made clear in *Witte*, "[e]nhancement statutes, whether in the nature of criminal history provisions such as those contained in the Sentencing Guidelines, or recidivist statutes which are common place in state criminal laws, do not change the penalty imposed for the earlier conviction." [Citation.] In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.' [Citations.]" (*Witte v. United States*, *supra*, 515 U.S. at p. 400.) Because appellant's current sentence does not change the penalty imposed for his earlier strike convictions, the sentence does not run afoul of the Double Jeopardy Clause.

#### *Romero*

Daniels also contends the court abused its discretion in denying his *Romero* motion. While this claim is cognizable in the absence of a certificate of probable cause (*People v. Buttram* (2003) 30 Cal.4th 773, 784-785), we conclude it lacks merit.

A trial court has the discretion to strike a prior serious felony conviction for purposes of sentencing only if the defendant falls outside the spirit of the Three Strikes law. (§ 1385; *People v. Williams* (1998) 17 Cal.4th 148, 161; *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th at pp. 529-530.) In deciding whether to exercise its discretion in this regard, the court "must consider whether, in light of the nature and

circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams, supra*, at p. 161.) "[A] trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the court considered impermissible factors in declining to dismiss . . . ." (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) In reviewing for abuse of discretion, we are "guided by two fundamental precepts. First, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." [Citations.] Second, a "'decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.*, at pp. 376-377.) Thus, only in "an extraordinary case—where the relevant factors described in *Williams, supra*, 17 Cal.4th 148, manifestly support the striking of a prior conviction and no reasonable minds could differ" would the failure to strike be an abuse of discretion. (*Carmony, supra*, at p. 378.)

Daniels fails to show that the court abused its discretion in refusing to strike one or both of his prior strike convictions. As we have noted, Daniels has a lengthy criminal record and the circumstances of his current offense demonstrate a particular disregard for the law. In denying his *Romero* motion, the court noted that "[e]very time [he] was released from custody, he committed a new offense within a couple of months." This record is sufficient to support the court's conclusion that Daniels did not fall outside

the spirit of the Three Strikes law. Because this is not one of those extraordinary cases in which the facts and circumstances effectively compel the conclusion that the defendant should be treated as if he were not a recidivist, the court acted within its discretion in denying his *Romero* motion.

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Dodie A. Harman, Judge

Superior Court County of San Luis Obispo

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